DOCUMENT RESUME

ED 058 859 HE 002 812

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TITLE Amicus Brief of the Association of American Law Schools.
INSTITUTION Association of American Law Schools, Washington, D.C.
PUB DATE 71
NOTE 47p.

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS *Collective Bargaining; *Faculty Organizations; *Higher Education; *Law Schools; Lawyers; Professional Personnel; *Professors; Voting Rights

ABSTRACT

The sole issue discussed in this amicus brief is whether law faculty should be in a representational unit separate from the rest of the university in National Labor Relations Board (NLRB) conducted elections. It is the position of the American Association of Law Schools (AALS) that the NLRB should adopt a policy of preferring to place law faculty in a bargaining unit separate from other university faculty. This brief demonstrates that the law faculty's sense of identity and community of interests are separate and apart from that of the rest of the faculty. It shows that, in comparison with other faculty, the law teacher comes from a different kind of academic work experience background, conducts himself in a manner that reflects his special responsibilities to the legal profession, is rewarded under separate promotional and salary criteria, teaches a very unique group of students, utilizes distinctive teaching methods, and operates within a different type of curriculum. In light of these and other circumstances, it is evident that the welfare of legal education and the legal profession are best served by finding that law faculty are in a separate voting unit. (Author/HS)

ED 058859

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF FORDHAM UNIVERSITY
AND AMERICAN ASSOCIATION OF UNIVERSITY
PROFESSORS, et. al.

CASE NO. 2-RC-15500
CASE NO. 2-RC-15507

AMICUS BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS

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I.

APPEARANCE

The Association of American Law Schools (hereinafter "AALS" or "the Association") hereby makes its amicus appearance.[1]

II.

STATEMENT OF ISSUE AND POSITION

The sole issue discussed in this amicus brief is whether law faculty should be in a representational unit separate from the rest of the university faculty in Board conducted elections. As set forth below, it is the position of the AALS that the Board should adopt a policy of preferring to place law faculty in a bargaining unit separate from other university faculty.

This brief will demonstrate that the law faculty's sense of identity and community of interests are separate and apart from that of the rest of the faculty. It will show that, in comparison with other faculty, the law teacher comes from a different type of academic and work experience background, conducts himself in a manner which reflects his special responsibilities to the legal profession, is rewarded under separate promotional and salary criteria, teaches a very unique group of students, utilizes distinctive teaching methods, and operates within a different type of curriculum. In all of these matters, law teachers share problems which are very different from those which confront other faculty. Moreover, as is discussed below, the law faculty works within an essentially self-governing unit in a separate physical facility, utilizes independent and unique research resources, and maintains close links to the practicing profession.

[1] The AALS was notified by a letter dated April 12, 1971 from Howard LeBaron, Associate Executive Secretary, that leave to appear amicus has been granted.

In light of these circumstances, it is evident that the purpose of the Act, the traditional relationships within the university, and the welfare of legal education and the legal profession, are best served by finding that law faculty are in a separate voting unit.

III.

THE AMICUS PARTY

The Association is an independent, non-governmental, non-profit association of schools of law. The central purpose of the Association is "the improvement of the legal profession through legal education. It has operated since 1900 as an unincorporated association of law schools admitted to membership upon application and demonstration of qualification under the terms of published Articles of Association and Executive Committee Regulations. AALS standards of accreditation are administered and maintained through a system of visitations made to member law schools. In the foregoing manner the Association operates as one of two recognized agencies for the accreditation of schools of law in the United States. Of the approximately 165 law schools in the country, 124 are accredited by the AALS.

The Association is governed by the member law faculties at its annual meeting. The Executive Committee, which consists of a President, President-Elect, and four committee members all elected by the annual meeting from the member faculties, conducts the affairs of the Association between annual meetings and has the power to interpret and implement the Association's requirements. The administrative affairs of the Association are entrusted to the Executive Director, a full time staff position.

The AALS Executive Committee has recently engaged in a review of the relationship of law faculties to collective bargaining activities amongst university teachers. As a result of its deliberations on this matter, the Executive Committee, on behalf of the Association, has taken the position that in most situations it would be unwise and unfortunate to include the law faculty in a university-wide bargaining unit. Accordingly, the Association urges that in shaping collective bargaining units for university faculties, the Board should adopt a policy of preferring that law faculties be placed in a bargaining unit separate from other university faculties.

IV.

THE SEPARATE AND UNIQUE CHARACTER OF LAW FACULTY STATUS

The specific characteristics of membership on a law faculty will vary somewhat from school to school. Nevertheless, as the information and discussion below demonstrate, there are basic similarities in faculties throughout the nation's law schools and by examining these similarities, it becomes readily apparent that law teaching is a singular experience, in a unique environment, requiring special background, training, and skills, and operating through its own form of corporate governance. Accordingly, law faculty status is characteristically very different from any other type of faculty position and, therefore, as more fully discussed in the "Argument" portion of this brief, law teachers have a separate community of interest apart from that of other university teachers.

1. Law Faculties Are Not A Necessary Structural Dimension of a University. -

An American university characteristically focuses its central attention upon undergraduate programs in the liberal arts and sciences and upon graduate level programs in the science and humanities disciplines. Normally, there is considerable integration and coordination amongst these programs and the faculties responsible for them. This high degree of interrelationship will sometimes extend to a professional program such as engineering or architecture, where that program involves basic science or humanities teaching offered elsewhere in the university. Although a law school enriches a university, unlike the typical academic unit the law school is not a necessary and integral part of a university, nor is interrelationship with a university a necessary and integral part of operating a law school. Accordingly, a number of prominent universities,

such as Princeton, Brown and Dartmouth, do not have a law faculty. Similarly, although location on a university campus certainly enhances the facilities available to a law faculty and law students, a few accredited law schools have no university affiliation,[2] and a number of well established law schools are located a considerable distance away from their main university campus.[3]

2. Law Faculties Use Separate Facilities. -

The distinctivenessof the law faculty and law program is also manifest in the fact that almost all accredited law schools are housed in wholly separate facilities even when they are part of the campus common to undergraduate, graduate and other professional school programs. It is both appropriate and desirable that the law school be separately housed. As demonstrated below, its program, faculty and student body operate as an autonomous unit. Accordingly, under Article 6 of its Articles of Association, the Association takes the position that it is highly desirable that a law school be housed in quarters exclusive to its use with separate offices therein for each full-time teacher and for the law librarian, and with special attention given to that part of the structure which houses the law library.[4] With but few exceptions, the physical facilities of accredited law schools fully comply with the Association's above described policy

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[2] E.g., Dickenson School of Law and Detroit College of Law.

[3] E.g., University of Connecticut College of Law, University of Denver College of Law, Georgetown University Law Center, Northwestern University School of Law.

[4] §9(a) · Approved Association Policy Under Article 6. See AALS, Proceedings of 1965 Annual Meeting, Part Two at P. 116.

respecting an adequate physical plant.

3. Separate Academic Calendar For Law Faculty. -

Law school programs most often operate on their own academic calendar, independent of the academic calendar for the rest of the university. Thus, examination of the academic calendars for a random sample of accredited law schools[5] shows that the Fall semester starting date does not coincide with the university calendar starting date in eleven out of the seventeen university affiliated law schools in the sample. From this data we can project that about 65% for the total population of accredited law schools operate under an academic calendar which is separate from that for the rest of the university.

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[5] To facilitate the collection of data, where published composite data is not available, the relevant information has been compiled for this brief using a random sample of accredited law schools. The sample was randomized by selecting every seventh school listed in the alphabetical listing of AALS accredited law schools contained in List I of the AALS Directory of Law Teachers: 1970. The resulting sample consists of: University of Alabama, School of Law; Boston College Law School; Case Western Reserve University Law School; University of Connecticut School of Law; Detroit College of Law; Florida State University College of Law; Howard University School of Law; University of Kentucky College of Law; Marquette University Law School; University of Missouri-Columbia, School of Law; University of North Carolina School of Law; University of Oregon School of Law; St. John's University School of Law; University of South Carolina School of Law; Temple University School of Law; University of Utah College of Law; Washington and Lee University School of Law; and the University of Wisconsin Law School.

If this random sample has a weakness, it is in the absence of any of the large, prestigious law schools such as Berkeley, Chicago, Columbia, Harvard, N.Y.U. Michigan, Pennsylvania or Texas. For the purpose of this brief, however, that absence merely increases the significance of the resulting data inasmuch as the large prestigious law schools have traditionally had, and still have, the maximum degree of institutional and faculty autonomy.

4. The Law School is Traditionally an Autonomous Unit. -

When a collective bargaining unit for university faculty was certified a year ago by the New York State Labor Relations Board pursuant to a consent election agreement, the law school was excluded from the university-wide unit.[6] The consent agreement in that case was an appropriate recognition of the traditional autonomy exercised by law faculties within a university. "The schools of the older professions, such as medicine and law, usually have the greatest autonomy."[7] "Autonomy gives a school control of its curriculum and its students, status in the University, and influence on university policy. . . . Because of age and prestige, the law schools have often had a high degree of autonomy."[8] The areas of law school autonomy within a university have elsewhere been catalogued as including the conducting of separate fund drives, autonomous law library operation, independent control over teaching load level for law faculty, self-determination of faculty appointments and changes in faculty status, and a separate compensation schedule.[9]

This tradition of law school autonomy is strengthening with more of

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[6] St. John's University, N.Y.S. Lab. Rel. Bd., Dec. No. 12630, Apr. 22, 1970.

[7] W. McGlothin, The Professional Schools at p. 63 (1964).

[8] W. McGlothin, Patterns of Professional Education at pp. 174-175 (1960).

[9] J. White, The Law School and the University Administration, 1969 U. Tolo. L. Rev. 395, 402-403.

the critical prerogatives moving from the presiding officer within the law school to the corporate entity of the full-time law faculty.

> On matters of educational policy and increasingly on matters of administration, law schools are in large measure self-governing, with authority centered in the deans and full-time faculty members. The trend is toward the power of the deans to decline vis a vis the faculty, and in many schools, student admission, curricula, faculty appointments and promotions are among matters effectively controlled by the full-time faculty rather than the law school deans or others in the university power structure. For the most part, however, it is the individual teacher who determines how and what he will teach in the courses assigned him and he personally prepares and grades examinations in his courses, with no review of the grading process by others.[10]

Law school self-governance is more than a tradition or expanding historic development. It is a standard for AALS accreditation. Article 6, section 4 of the Association's Articles states that a law faculty shall be "vested with primary responsibility for determining institutional policies." The statement of approved policy under this heading explains that: "Upon the full-time faculty members rest the major burden of planning and executing the institution's instructional work."[11]

Specific provisions in the Association's Approved Policy describe the requirements of law faculty autonomy in terms of the faculty's exercise of "a substantial degree of control over decanal and faculty appointments or changes in faculty status."[12] A typical illustration of this last aspect of law school autonomy is provided by a recent survey in which 75% of the law schools reported

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[10] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 49 (1967).

[11] Approved Association Policy at Article 6 §4(b). AALS, Proceedings, 1965 Annual Meeting, Part Two at p. 161.

[12] Approved Association Policy at Article 6, §4(c) in AALS, Proceedings, 1965 Annual Meeting, Part Two at p. 162.

that their promotion policy differs from that of the general university policy and that in a majority of the institutions the law school's promotion recommendation either bypasses a general university promotion committee or receives pro forma approval by such a committee.[13]

Approved Association Policy also states that a member school should have wide discretion to identify its goals, formulate its program, determine its program financing needs, make its own presentations to the principal university officer, seek advice and assistance from outside groups and individuals, and raise funds outside of university sources.[14]

5. Law Faculty Are A Separate Breed. -

Law teachers differ considerably, as a group, from other university teachers. The law teacher has a characteristically different type of academic background, is recruited from a different manpower source, has a different orientation to the non-academic world, is compensated at a different level, and advances through the academic ranks at a different pace.

Law faculties are generally recruited from amongst the practicing profession rather than directly out of the academic environment.[15] Thus, a check of our sample of law schools shows that at least 60 percent of the full-time teachers in accredited schools engaged in professional employment outside the university between receiving their law degree and entering upon law teaching.[16] With a few exceptions, all law teachers are admitted to practice

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[13] AALS, Proceedings, 1968 Annual Meeting, Part Two at pp. 198-199.

[14] Approved Association Policy at Article 6 §5 in AALS, Proceedings, 1965 Annual Meeting, Part Two at p. 163.

[15] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 48 (1967).

[16] AALS, Directory of Law Teachers: 1970. The sample used is described in footnote 5. It is believed that the percentage is actually even higher inasmuch as some faculty may have neglected to list their prior practice experience in the biographic sketch.

law in one or more jurisdictions.[17] In contrast, the general supply of new university level teachers "consists largely of students receiving graduate degrees."[18] Indicative of this difference in career pattern is the fact in the 1964-1966 period over 60% of the doctorate recipients in all fields went directly into college and university teaching.[19]

Moreover, the academic training of law teachers is markedly different from that of university teachers generally. Normally, in university teaching the research doctorate degree is a prerequisite to full professorial recognition. Although it is possible to secure a research doctorate in law, that degree does not play a significant role in preparation for law teaching. Rather, the normal expectation for academic preparation in law teaching is the professional degree - the J.D. or LL.B. Thus, whereas 52.7% of all full-time university teachers hold research doctorate degrees, only 8.8% of the full-time teachers in our random sample of accredited law schools hold the research doctorate.[20]

This distinction in academic preparation can be seen in the differences in the duration of academic preparation as well as in the differences in the style of the preparatory programs.

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17 Q. Johnstone & D. Hopson, supra at p. 49.

18 U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupation Outlook for College Graduates at p. 179 (1970-71 ed.).

19 U.S. Dep't. of H.E.W., The Education Professions - 1968, Table 65 at p. 342.

20 U.S. Dep't. of H.E.W., Digest of Education Statistics: 1970 at p. 82; AALS Directory of Law Teachers: 1970 and individual school bulletins. The sample is described at note 5, supra.

Whereas the law degree is normally earned in a structured three year program, 58.1% of those in full-time university teaching did not receive their highest degree until at least five years after being awarded the B.A. or its equivalent.[21] And in more recent decades that time span has been even longer. Thus, for those receiving the doctorate during 1964-1966, the median years from baccalaureate to doctorate was 8.2 years.[22] Accordingly, whereas the young law teacher's student phase is normally behind him, many young teachers elsewhere in university teaching are simultaneously completing, or attempting to complete, their Ph.D. requirements.[23]

Promotion expectations for law teachers are quite different from those of other university teachers. Generally, university teachers are rarely promoted to full professor rank until they have their doctorate and over seven years of teaching experience.[24] Law teachers are promoted to full professor at a much earlier stage, and the research doctorate is not a prerequisite to that promotion. For example, a comprehensive study based on 1956-1957 data showed that at a majority of law schools the promotion to full professor came an average of six years after initial appointment.[25] An examination of the biographic sketches of the faculty in our sample of law schools shows that at the median law school, based on average time for promotion to full professor, the average full professor received his promotion 5.7 years after entering law teaching.[26] This difference in promotional

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[21] U.S. Dep't. of H.E.W., Digest of Education Statistics: 1970 at p. 82.

[22] Yearbook of Higher Education: 1969 at p. 531. The median age of male doctorate recipients in all fields in 1966 was 31.5 years. Id. at p. 534.

[23] U.S. Dep't. of H.E.W., The Educational Professions - 1968 at p. 232.

[24] U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Outlook for College Graduates: 1970-71 at p. 179.

[25] AALS, Anatomy of Modern Legal Education at p. 171 (1961).

[26] The data was secured from AALS, Directory of Law Teachers. 1970 and the sample is described in note 5, above.

expectations can also be seen by comparing the structural distribution of full-time faculties amongst the three professorial ranks as shown below:

Rank	Percentage of All University Full-Time Faculty[27]	Percentage of Law School Full-Time Faculty[28]
Professor	27.2	57.8
Associate Professor	22.5	21.2
Assistant Professor	29.6	20.9

Comparative data does not seem to be available on the relative expectations concerning tenure. However, it is generally recognized that whereas the prospect of securing tenure is very uncertain for most young university teachers, the prospects are very high that the new law teacher will achieve tenure. Moreover, the young law teacher will receive it sooner than the teacher on some other faculty. A possible explanation for this is that law faculties are probably more rigorous than other faculties in their hiring policies.

Transfers from other academic units into law teaching are extremely rare. We can project that the sole teaching experience of over 96% of all full-time law teachers has been on a law faculty.[28a]

Law faculty can chose between teaching and practicing their profession. For this reason, their salaries are influenced by the larger market place.[29] And, because law is a well compensated profession, law teachers are paid markedly above the general university compensation levels.[30] Although specific law

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[27] Distribution of Full Time University Faculty by Rank, Spring, 1969, in U.S. Dep't. of H.E.W., Digest of Educational Statistics at p. 82 (1970 ed.). A portion of the full time university faculty have less than professorial rank.

[28] Based on our previously described sample using data extracted from AALS, Directory of Law Teachers. 1970. Visiting faculty were not included with other full-time faculty for these figures.

[28a] 11 out of 303 teachers in our random sample (see n. 5, supra) had other teaching experience. Information on outside teaching is elicited for the biographic sketches. AALS, Directory of Law Teachers: 1970 at p. 8, item 8.

[29] W. McGlothlin, The Professional Schools at p. 62 (1964); D. Wollett, The Status and Trends of Collective Negotiations for Faculty in Higher Education, 1971 Wisc. L. Rev. 2, 18.

[30] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 47 (1967); A. Goldman, More on the Economics of Law Teaching, 19 J. Legal Ed. 451-452, (1967).

school salary data is not very readily available, enough information is at hand to provide a reasonably accurate portrayal of the differences between law faculty and general university compensation levels. For example, in the Summer of 1965, Professor William D. Ferguson surveyed over 2,000 law teachers concerning their level of salary. He received about a 50% response which, because the survey was self-selective, may have tended to be slightly biased toward those employed at schools with lower salaries. In any event, the average law school salary by rank, according to Professor Ferguson's survey, was $16,749 for a full professor; $12,271 for an associate professor, and $10,230 for an assistant professor.[31] The American Association of University Professors reported the following average salary, by rank, for all full-time university teachers in the 1965-66 academic year: $14,636 for a full professor, $10,665 for an associate professor, and $8,721 for an assistant professor.[32] Based on these figures, a comparison shows that the average law professor was paid 14% more than the average university professor at the full professor rank, 15% more at the associate rank, and 17% more at the rank of assistant professor.

The differences between law faculty and general university faculty salary levels is more strikingly and more accurately demonstrated by taking the 1969-1970 average compensation (salary plus fringe benefits) and average salary figures for the law schools in our sample and comparing them with the equivalent data for the university-wide faculty at the same schools.[33] These comparisons reveal that for the 14 schools in our sample for which complete average compensation data is available, the median difference between law faculty and general faculty compensation at the

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[31] W. Ferguson, Economics of Law Teaching, 19 J. Legal Ed. 439, 440 (1967).

[32] The Economic Status of the Profession, 52 AAUP Bull. 141, 153 (1966).

[33] The university-wide figures are shown in 56 AAUP Bull. at pp. 204-234 (1970). The law school figures are compiled annually by the American Bar Association Section of Legal Education and Admissions to the Bar and distributed to the law school deans by Professor Millard Ruud, Consultant on Legal Education to the American Bar Association.

the same university was 39%, in favor, of course, of the average law faculty compensation. At the median sample school, ranked by the size of the differential in compensation levels, the average 1969-70 law school compensation was $22,540 whereas the average university-wide faculty compensation was $16,182. The range within which the average law faculty compensation in the sample exceeded the average compensation for the campus-wide faculty at each school was from 21% to 62%. The average institutional differential of law faculty over university-wide average compensation for these same schools was 40%.

The results are similar if average salaries are compared. Complete data for this purpose is available for sixteen of the schools in our sample. These figures show that at the median institution in the sample the average law salary was 37% greater than the university-wide average faculty salary, and that the average of differentials for all sixteen schools was a 40% advantage for the law salaries. The specific figures for the median institution, when ranking the schools by the extent of average salary differential, was an average law school salary of $17,193 and an average university-wide salary of $12,531.

The range of average salary differential between law faculty and university-wide faculty for the sixteen schools was from 20% to 69%. At the institution with the highest average law salary in the sample, the average law faculty member was paid $20,929 and the average university-wide faculty member received $12,394. And, at the institution with the lowest average law salary in the sample, the average law faculty member was paid $16,263 and the average university-wide faculty member received $13,158.

The foregoing data is summarized in the following table:

TABLE

SAMPLE LAW SCHOOL vs. UNIVERSITY-WIDE FACULTY PAY SCALE

	Average Law School Compensation	Average University Compensation at Same Institution
1. Median sample school ranked by percent of differential between law school and university		
a) Amounts	$22,540	$16,182
b) Percentage Difference	39% >	
2. Average Differential in Sample	40% >	
3. Range of Differentials in Sample	21% > 62% >	
4. Highest average law faculty compensation in sample	$22,540	$16,182
5. Lowest Average law faculty Compensation in sample	$17,843	$13,153

	Average Law School Salary	Average University Salary at The Same Institution
1. Median sample school ranked by percent of differential between law school and university		
a) Amounts	$17,193	$12,531
b) Percent Difference	37% >	
2. Average Differential in Sample	40% >	
3. Range of Differentials in sample	20% > 69% >	
4. Highest average law salary in sample	$20,929	$12,394
5. Lowest average law salary in sample	$16,263	$13,158

Recognizing the clear-cut differences in law faculty pay schedules, as distinguished from university-wide faculty schedules, the AALS Law School Administration Committee has initiated a project to establish AAUP type salary scale classification ratings appropriate for use by law schools.[34] That is, the AALS Committee has determined that the AAUP salary ratings are meaningless for law schools, necessitating the introduction of a special salary rating system to take care of the law schools.

One provocative observer summed up the status of the law faculty on a university campus by calling it "an odd group." Pointing out that because the law schools are small, law teachers know each other, he states "[T]hey get on well with each other; and they tend not to know people on the other faculties of the university."[35] In a similar vein, David Riesman, while criticizing law teachers for their "self-preening complacency," adds:

> But there's a nice thing about law schools: I was a full professor of law at the age of twenty-seven. It's the opposite extreme from the British and German system of a chair, or from the way things work at the faculties of arts and sciences.[36]

6. The Part-Time Law Teacher. -

The part-time law teacher is normally a full-time practicing lawyer or judge who additionally engages in part-time instruction, usually in the field of his practice speciality.[37] Often they are employed to fill temporary vacancies on a staff; other times they are hired for their expertise in a particular narrow speciality in which no one on the full-time faculty has a teaching interest.[38]

The presence of a few part-time law teachers provides one of the several important links normally found between the law faculty and the practicing

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[34] AALS, Proceedings, 1968 Annual Meeting, Part Two at p. 197.

[35] M. Mayer, The Lawyers at p. 116-117 (1966).

[36] Quoted in M. Mayer, supra at p. 117.

[37] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 49 (1967).

[38] Q. Johnstone & D. Hopson, supra.

bar.[39] Similarly, the presence of these judges and practitioners helps to promote a sense of professional identity on the part of the students.[40]

7. Law is Taught Differently -

Law school teaching is different. Course content is largely dependent upon the individual teacher. Thus, Professor Charles Kelso can report that when he was a student he took Constitutional Law three times and Jurisprudence four times - from different instructors - and each time it was different.[42]

While a wide variety of techniques are used, the case method and casebook still provide the central approach to teaching law.[43] The first year law student must go through a period of adjustment to the methods of instruction and the techniques of law study.[44] Despite the resulting anxieties, law teaching is unusually successful in generating student enthusiasm in the first year.[45] It has often been asserted by non-law teachers that "What the law professors offer in their courses is the best quality of education in America."[46]

On the other hand, law students generally enter upon a period of boredom and intellectual and professional restlessness in their second and, especially in their third year.[47] This pattern poses a special problem for the law faculty and greatly influences decisions concerning program design, teaching

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[39] AALS, Anatomy of Modern Legal Education at pp. 338-39.

[40] AALS, Report on the Study of Part-Time Legal Education in Proceedings, 1969 Ann. Meeting, Part One at pp. 5, 43.

[42] C. Kelso, Curricular Reform for Law School Needs of the Future, 20 J. Legal Ed. 407, 408 (1968).

[43] Q. Johnstone & D. Hopson, Lawyers and Their Work at p. 51 (1967); A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91, 121 (1968)

[44] Anxiety and the First Semester in Law School, 1968 Wisc. L. Rev. 1201, 1202, 1204.

[45] S. Warkov & J. Zelan, Lawyers in the Making at p. 73 (1965); H. London & A. Lanckton, Why Teaching is Better in Law Schools, Education Record, Fall 1968 at p. 444.

[46] M. Mayer, The Lawyers at p. 118. Also, W. Johnston, Teaching in The Law School, 37 J. Higher Ed. 159 (1966). And see previous footnote.

[47] See, e.g., P. Savoy, Toward A New Politics of Legal Education, 79 Yale L.J. 444, 446 (1970); D. Robertson, Some Suggestions on Student Boredom in English and American Law Schools, 20 J. Legal Ed. 278 (1968); A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91, 141 (1968).

technique, and the propensity for curriculum innovation.

Law teachers are probably more introspective than any other group of university faculty respecting teaching technique and curricular organization and are forever reexamining these problems at meetings, in the Journal of Legal Education, with alumni, and in the law journals. For example, at least one observer attributes the upper classman's boredom to the pedagogical techniques emphasized in the first year of law school.[48] Others have urged the expansion of clinical programs as a means for revitalizing student interest[49] and still others have suggestions for yet different approaches.[50] Whatever the proposals, though, law teachers recognize their common interest in resolving their unique problems of pedogogy. And, in this connection, the AALS and other organizations are engaged in active programs designed to improve the techniques of law teaching. These efforts include the Association's summer teacher clinic, the summer institute for law teachers on social science method in legal education, the continuing surveys and reports of the AALS Committee on Teaching Methods, the former N.Y.U. summer institutes for law teachers, and the conferences and publications of the Labor Law Group Trust.

The examination technique by which law teachers test student achievement provides still another area in which the law school is a very singular institution. Law students are examined less frequently but more comprehensively than are students in most other parts of a university. The resulting examination papers take an extraordinarily long time to grade, a responsibility

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[48] A. Watson, The Quest for Professional Competence, supra at p. 137.

[49] E.g., J. Ferron, Goals, Models and Prospects for Clinical Legal Education, in Clinical Education and the Law School of the Future at p. 94 (Kitch ed. 1970); A. Fortas, The Training of the Practitioner, in Haber & Cohen, The Law School of Tomorrow at p. 179, 186-192 (1968).

[50] E.g., R. Gorman, Legal Education Reform: A Prospectus, 16 Student Law 8 (May 1971), R. Alleyne, Creative Legal Research: Relevant Uses for an Old Law School Curriculum, 20 Buff. L. Rev. 459 (1971); P. Savoy, Toward a New Politics of Legal Education, 79 Yale L.J. 444 (1970); E. Mooney, The Media is The Message, 20 J. Legal Ed. 388; C. Kelso, Curricular Reform for Law School Needs of the Future, Id. at 407 (1968).

which can be borne only by the law teacher.[51] This, too, helps make law teaching a distinctive type of function.

8. Law Faculties Teach a Separate and Unique Student Body. -

The character of the student body is an important factor in shaping program content and teaching technique. A distinctive student body, therefore, poses distinctive problems respecting the central aspect of a teacher's activities.

Undergraduate, and to some extent graduate and other professional school programs, normally deal with a common student body. In contrast, law faculties deal with a separate and singular student body. For example, on the average each school in our random sample of law schools, referred to above, drew students into its first year class from 64 different undergraduate institutions - the median school drawing its student body from 52 institutions.[52] As a result, the parent university's undergraduate admissions policies, curriculum, facilities, and programs bear very little relevance for the law school.

Not only does a typical law school student body come from a large number of other campuses, it also is separated and distinguished from the main body of students in other ways. For example, law students come from highly varied academic backgrounds with the result that, unlike teachers in most graduate and professional areas, the law teacher cannot depend on the students sharing a common pool of skills or knowledge.[53] The law student is a separate type in terms of sociological background as well. Thus, a study has shown that law students come in disproportionately high numbers, in relatinnship with the overall student population, from families in which there is a lawyer parent,[54] and

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[51] A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91, 160 (1968).

[52] AALS-LSATC, 1970/71 Pre-Law Handbook at pp. B(1)5 - B(1)22 (Bobbs-Merrill ed.). The sample is described in note 5, above.

[53] A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91, 98 (1968).

[54] S. Warkov & J. Zelan, Lawyers in the Making at p. 43, 52 (1965).

that religious background and prior academic performance are additional key factors in career choice for law.[55]

Similarly, racial minorities are absent from law schools in disproportion to the overall university student population.[56] Because of this, law faculties have an exceptional need to focus upon the socio-cultural dimension of student recruitment. Accordingly, numerous efforts have been undertaken by law faculties to alter the law student "mix" and there is considerable debate amongst law teachers, as the persons responsible for making such decisions, concerning how that goal can best be achieved.[57]

Law teachers are, additionally, confronted with the problems arising from the fact that the law student has a distinctive set of attitudes and values which set him apart from the undergraduate student, the graduate student or the student in some other professional school. Studies show that, to a distinguishing degree, law students identify with making money, helping others and being socially useful. In contrast with other university students, the law student tends to reject originality, creativity and a gradual, secure road to success.[58] In addition, those who have studied law students in comparison with other students report that law students feel an exceptionally strong need to find order in our social system and to shape aggressive drives.[59] Moreover, it is reported that law students have had particular childhood relations with their parents and others, distinguishable from the childhood experiences of those enrolled

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[55] Id. at p. 45, 52; C. Campbell, The Attitudes of First Year Law Students At the University of New Mexico, 20 J. Legal Ed. 71, 72-73 (1967).

[56] AALS Minority Groups Project Report, 1965 AALS Proceedings, Part One at p. 171; E. Carl, The Shortage of Negro Lawyers, 20 J. Legal Ed. 21 (1967).

[57] See, e.g., Reports of Council on Legal Education Opportunity. Also, AALS Statement before the Senate Subcommittee on Education, reported in AALS, Proceedings, 1970 Annual Meeting, Part One at pp. 49, 55-60; Symposium, Dis-Advantaged Students and Legal Education, 1970 U. Tol. L. Rev. 277; L. Graglia, Special Admission of the "Culturally Deprived" to Law School, 119 U. Pa. L. Rev. 351 (1970); D. Bell, In Defense of Minority Admissions Programs, id. at 364; Symposium, Minority Students in Law School, 20 Buff. L. Rev. 423 (1971); Comment, id. at 473.

[58] S. Warkov & J. Zelan supra at p. 12.

[59] A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 93, 103 (1968).

in other sorts of professional programs.[60]

Further, law teachers must resolve both the special opportunities and the special difficulties which result from the fact that entering law students display, as a group, an exceptionally high level of cynicism toward human conduct. By his senior years, the law student's level of cynicism is considerably reduced. Conversely, law students enter upon their education with a weaker orientation toward humanitarian values than they have at the end of their legal education. (Different attitudinal levels and directional changes have been found respecting the professional educational experience in medicine and nursing.) The two clinical psychologists who made these findings concluded that: "[L]aw training for the majority of students facilitates a generally humanitarian outlook, with some stabilization in attitudes, accompanied by a decrement in hostile and cynical feeling and expression. There is retained, however, some, perhaps an importantly large, degree of cynicism in the average lawyer personality."[61] It is clear, therefore, that law teachers have some success in attaining their goal of improving the legal profession through legal education.

Law school appears to have another professionally oriented attitudinal impact upon the student body. Legal education may improve the student's attitude toward the desirability of law practice. For example, a study shows that while about 20% of entering law students do not have career plans in law, by the end of their first year of legal education a clear majority of that group shift their career goals and plan to be lawyers.[62]

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[60] B. Nachmann, Childhood Experience and Vocational Choice in Law, Dentistry, and Social Work, 7 J. Counsel Psych. 243 (1960).

[61] L. Eron & R. Redmount, The Effects of Legal Education on Attitudes, 9 J. Legal Ed. 431, 443 (1957). For a discussion of the law teacher's impact upon the student's conceptualization of what the law ought to be, see, R. Keeton, Law Reform and Legal Education, 24 Vand. L. Rev. 53-56 (1970).

[62] J. Zelan, Occupational Recruitment and Socialization in Law School, 21 J. Legal Ed. 182, 196 (1968).

Significant differences have been found by researchers between the personality type characteristics of law students and the personality type characteristics of other university students. "In particular, the greatest difference was defined by the Thinking-Feeling scale. 72% of the law students were 'thinking' types whereas 54% of the liberal arts undergraduates were 'thinkers'. Other highly significant differences were found on one or more of the dichotomous scales between law students and medical, business, science and engineering students."[63] Law school was found to be exceptionally attractive to students whose personalities can be characterized as dependable and practical, having a realistic respect for facts, an ability to absorb and remember great numbers of facts and to cite cases to support their evaluations, and a tendency to emphasize analysis, logic and decisiveness.[64]

These findings have significance far beyond predicting vocational choice or merely describing the character of the typical law student. Comparison of personality information and law school performance, for example, shows that the "feeling" type student dropped out of law school with twice the frequency of the "thinking" type and, by refining the depiction of particular student personality types, we find that some types drop out of law school with four times the frequency of others.[65] The special significance which this information has for the law teacher becomes evident when one considers

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[63] P. Miller, Personality Differences and Student Survival in Law School, 19 J. Legal Ed. 460, 465-466 (1967).

[64] Id. at p. 466.

[65] Ibid.

the law school's responsibility in providing manpower resources for the bar. Experts have suggested that the admissions, teaching, testing and curricular practices of law schools are largely responsible for these personality patterns.[66] Accordingly, in making such choices respecting admissions, teaching, testing, and curricular policies, the law teacher, as a bar member, must weigh the character and needs of the profession and the profession's responsibilities to our society. Whether the best choices have always been made in these matters is subject to debate, and is vigorously debated amongst the law teaching profession. Nevertheless, these problems must be resolved and pose another unique facet of the law teacher's responsibilities.

Yet another special characteristic of law students which generates special problems for the law faculty is the overall lack of financial assistance for law students. Law students "have been singularly starved for adequate financial assistance to meet the high cost of attending three years of study required for completion of the first professional degree. Unlike the health and other sciences . . . and a wide variety of humanistic disciplines for which graduate students have been able to receive. . . assistance, students in law have, for the most part, been

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[66] A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91 (1968); Freedman, Testing for Analytic Ability in the Law School Admission Test, 11 J. Legal Ed. 24 (1958).

required to rely on loans and work-study where institutional funds have not been adequate to meet their needs."[66a] The financial burden of law students is comparable to the situation faced by undergraduates with this crucial distinction - the law student has already accumulated the debts of his undergraduate education. This dilemma creates pressures on the student to attend on a part-time basis or to carry both a full-time student load and a heavy employment schedule. Whatever the choice, the result has a serious impact on classroom preparation and curriculum scheduling. Also, this burden falls most heavily upon the law school's ability to recruit minority group students. Further, this situation results in scholarship and loan programs usually taking first priority in the law school's fund raising endeavors vis a vis outside resources.

It has been said that: "Law students tend to live together and eat together; like medical students, they form a separate caste at a university. They work hard. . . . Law schools try to fill extracurricular time with law related activities . . .and professors stress the importance of talking over the day's work with fellow students."[67] Recognizing their mutuality of interests, law students have long separately represented those interests through their own student body organization - the student bar association. Starting in the late 1940's, law students nationally declared their separate identity by establishing the American Law Student Association. The stature of that national source of identity was increased in 1967 with ALSA's absorption into the newly created Law Student Division of the American Bar Association.

[66a] Statement of AALS to Senate Subcommittee on Education, reported in AALS, Proceedings, 1970 Annual Meeting, Part One at p. 55.

[67] M. Mayer, The Lawyers at p. 96 (1966).

Moreover, the law student spokesmen have been active advocates of law student concerns.[68] For example, the efforts of these student groups were probably a principal factor in the transition of the first degree in law from the LL.B.to the J.D.[69] Student bar efforts have also played a significant role in increasing the legal services programs at law schools.[70]

9. Unique Demands of Law School Curriculum. -

A law faculty is faced with unique curriculum, syllabus, and personnel problems due to the fact that the law school is preparing the bulk of its students for entry into the legal profession. For example, there is great concern among law faculties respecting the best approach to providing students with an appreciation for high standards of professional responsibility. "Students expect to be taught to behave like lawyers. . . . They will also be interested in understanding what 'ethical behavior' consists of, though they cannot yet define what they mean by it."[71] A major conference on this topic was held in 1956 and another in 1968.[72] Similarly, almost every volume of the Journal of Legal Education has carried at least one article discussing the place of professional

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[68] See, e.g., Law School Newsletter, 15 Student Law. 30, 33, 36 (Mar. Apr., May 1970).

[69] The Juris Doctor: A Year in Review, 11 Student Law. 11 (June, 1966).

[70] R. Sims, Law Students Gather to Face Challenges, 12 Student Law. 18 (May. 1967); 8000 Students Want LSP, 15 Student Law. 19 (Sept. 1969).

[71] A. Watson, The Quest for Professional Competence, 37 Cinn. L. Rev. 91, 106 (1968).

[72] See, J. Stone, Legal Education and Public Responsibility (1959); Symposium on Education in the Professional Responsibilities of the Lawyer, 41 U. Colo. L. Rev. 303 (1969).

responsibility materials in the law curriculum. This issue is often tied into another special concern of law teachers - the utilization of clinical experiences in legal education.

While other types of schools use clinical programs, most notably those in the health education area, the nature of the legal profession creates special problems for clinical training administered by a formal educational institution. The medical school model, for example, is not applicable. Nor does the clinical model of the laboratory or engineering science fit the professional opportunities for clinical education in law.

Some programs of a clinical nature have long been part of, and are unique to, legal education - e.g., moot court and practice court. Experiments in new approaches to this area are an integral part of the modern law school [73] and have been encouraged by the activities of the Council on Legal Education for Professional Responsibility. Most notable are the programs which provide the third year law student with conditional status at the bar and permit him to engage in supervised practice of the profession. This sort of program poses special operational and manpower problems for the law school, and gives great immediacy to the law teacher's ethical and other obligations as a professional practitioner.

And then, of course, the previously discussed problem of the upper classman's syndrome[74] provides the law teacher with another set of curriculum concerns which he shares with, but essentially only with, his fellow professors of law.

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[73] See, generally, Clinical Education and the Law School of the Future, (E. Kitch, ed. 1970); AALS Statement to Senate Subcommittee on Education, reported in AALS, Proceedings of 1970 Annual Meeting, Part One at pp. 49, 62-65.

[74] Note 47, above, and accompanying text.

Still another unique curriculum concern of the law faculty is its role in aiding the practicing profession to keep abreast and to improve the quality of its performance. A few other professional school faculties share an analogous obligation to their professional colleagues but the nature of each profession is sufficiently different to necessitate distinctive approaches in meeting that responsibility. In the case of continuing legal education, bar associations and special entities such as the American Law Institute, the Practicing Law Institute, and the Southwestern Legal Foundation, have developed particular roles for providing the profession with academic resources. Law schools, too, have participated in a variety of individual, supplementary, and supportive programs. As a result, law faculties have a special need to coordinate with a variety of professional organizations in the process of maximizing the contribution of their own continuing legal education activities.

An additional force shaping law school curriculum decisions is the expectation that most law school graduates will take a bar examination which they must pass prior to being admitted to practice the profession. Although legal educators generally are adverse to permitting the pattern and content of legal education to be dictated by the bar examination, some fallout is inevitably felt in the law school curriculum - at the very least in terms of student elections amongst non-required courses. To minimize the impact of the bar exam upon curriculum design, law faculties must devote considerable time and effort to maintaining a liason with the bar examiners so as to keep them abreast of the developments in legal education. Similarly, legal educators have a need to gain better understanding of the impact of the bar exam on bar admissions and legal training. In this connection, the AALS is sponsoring a special study project on bar examinations.

10. Law Faculty's Special Concern Respecting Library Facilities. -

The law library is a central element of the law school. For this reason, the Approved AALS Policy notes that the law faculty should have an effective voice in its operation, that it should operate as an integral part of the law school, and that it should have sufficient autonomy in matters of administration, finance, personnel and service to accomplish its high standard of performance.[75]

Law faculty interests in the operations of the law library are of a greater magnitude than are the typical library concerns of university faculty. In addition to the law library being the focal point of his teaching and research activities, the law teacher has a responsibility to his fellow professionals to maintain the law school library as a major regional resource for the entire bar. Partly for this reason and partly due to the intrinsic nature of a law library, the demands for adequate law library facilities are far beyond those normally encountered at a university. This can to some extent be illustrated by comparing the ratio of books to students in university libraries with the number of law school library holdings per student. The university-wide data is provided in an H.E.W. publication.[76] The law library figures may be computed from information available in the Pre-Law Handbook.[77] Although the H.E.W. data counts part-time students on a fractional basis, in making our computations we have treated part-time and full-time law students alike with the result that smaller ratios for the law schools were achieved than would have been com-

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[75]Article 6 § 8, Articles of the AALS at AALS, Proceedings 1968 Annual Meeting, Part Two at p. 231.

[76]U.S. Dep't. of H.E.W., Library Statistics of College and Universities: Fall 1969 at Table 1 (1970).

[77]AALS-LSAT, 69/70 Pre-Law Handbook at Appendix B(1) (Bobbs-Merrill ed.).

puted had the H.E.W. approach been used. Nevertheless, for the fifteen institutions in our sample for which complete data is available, the median number of volumes per student in the university libraries is 57, whereas the median number of volumes per student for the law library is 223. The full schedule of these comparisons is set forth in the footnote below.[78] The criteria for an "excellent" law library calls for 350 volumes per student.[79]

Moreover, the nature of a law library is such that it is comparatively much more expensive to operate per patron and per volume than is the typical University library.[80] It is not at all surprising, therefore, that law

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School	University Library Volumes per Student	Law Library Volumes per Student
Alabama	57	310
Boston	78	165
Case-Western Res.	113	290
Connecticut	52	157
Florida State	51	120
Kentucky	56	223
Marquette	51	214
Missouri	52	357
N. Carolina	101	256
St. John's	43	106
S. Carolina	70	123
Temple	34	242
Utah	67	303
Wash. & Lee	175	227
Wisconsin	55	212

[79] M. Gallagher, The Law Library in a New Law School, 1 Tex. Tech. L. Rev. 21, 27 n. 14 (1969).

[80] M. Gallagher, supra at p. 29. In 1967 only three out of 23 categories of library book purchases had an average price above that of law books, in 1969 only one out of 23 categories cut priced law books, and in 1970 only 3 of the 23 categories were more expensive. The average price for law books in 1970 was 41% higher than the average for all book categories. 199 Publishers' Weekly, Feb. 8, 1971 at p. 51.

faculties find it important to play a very active role in shaping law library policy. Accordingly, a 1957 survey showed that in 3 out of 5 schools reporting, the selection of the law librarian was treated as a law school matter; in 4 out of 5 schools reporting, the law librarian's salary was treated as a law school matter; the presentation of the law library budget was a law school matter in two-thirds of the schools reporting; and law library hours were a law school matter at over two-thirds of the schools reporting.[81]

V.

ARGUMENT

1. Preliminarily. -

In traditional terms, this amicus brief supports a single plant or departmental type unit for law faculty. Congress was aware of the need for such a separate voting unit for a particular professional group when it adopted the Labor Management Relations Act of 1947,[82]

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[81] AALS, Anatomy of Modern Legal Education at p. 432 (1961).

[82] In summarizing the Conference agreement, Senator Taft stated: "The House Bill did not contain any definition of the term 'professional employees,' although section 9(f)(3) thereof recognized the principle embodied in section 9(b) of the Senate amendment by permitting professional personnel to have voting units of their own in representational cases." (Emphasis supplied) NLRB, Legislative History of the Labor Management Relations Act of 1947, at p. 1537 (1948).

The Senate Report on the original bill, in discussing the amendments respecting professional employees, stated that section 9 would "require separate voting units of professional employees." (Emphasis supplied.) Id. at p. 425.

and the cases and decisions clearly hold that it is appropriate to place different groups of professionals in separate voting units even though all work for a single employer.[83]

The principle of the Taft-Hartley amendments respecting professional employee units was stated in the House Conference Report as "to give groups of employees having common characteristics and interests different from those of the more numerous members of a proposed unit a greater freedom of choice in selecting their representatives. . . ."[84] And the Senate Report on the original version of Senator Taft's bill specified that the new provisions respecting professional employees were in recognition of the professional employees' interests in maintaining certain professional standards.[85]

It is the position of this amicus brief that law school professors constitute a group which shares common characteristics and have interests quite different from those of other university professors,by far the more numerous members of the proposed unit. The special interests of the law faculty, moreover, include the maintenance of the standards of the legal profession.

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[83] Westinghouse Electric Corp. v. N.L.R.B., 236 F.2d 939, 943, (3d Cir. 1956); Douglas Aircraft Co., 157 NLRB 791 (1966); Westinghouse Air Brake Co., 121 NLRB 636 (1958); Western Electric Co., 98 NLRB 1018 (1952). See also, Royal Globe Ins. Co., 29-RC-1081, 1969 CCH NLRB. Dec. ¶20,695 (Mar. 19, 1969) where Regional Director Kaynard placed different groups of lawyers in separate voting units.

[84] NLRB, Legislative History of the Labor Management Relations Act of 1947, at p. 551 (1948).

[85] Id. at p. 417.

Therefore, the intent of the Act, as described above, will be carried out only if the Board rules that professors of law constitute a preferred unit in elections involving university faculty.

2. Applicable Criteria. -

An essential task in resolving the instant issue is to ascertain the correct criteria for separating out a particular group from a larger group of professionals. The broad guidelines for making that distinction are provided by the legislative history of the "professional option" provisions of section 9, discussed above: Does the particular professional group have common characteristics; does the particular professional group have interests different from the professionals in the more numerous unit which has been proposed; and would a separate unit for the particular professional group serve to maintain the distinctive standards of that profession?

Additional, and more detailed, guidance is provided by the Board's prior decisfons in professional, plant and departmental unit cases. An examination of those decisions reveals that the Board has recognized a separate professional, plant or departmental unit as the preferred voting unit where the following factors manifested a distinctive community of interest:

(a) Lack of Functional Integration The Board tends to establish separate units where there is little or no integration in the functional responsibilities of the several groups of employees.[86] Functional integration of an operation provides a basis for projecting the extent to which there will be job related interpersonal contact and a sense of mutual

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86 E.I. Dupont De Nemours, 162 NLRB 413, 419-420 (1966).

identity between the members of the various proposed units. Perhaps even more importantly, the extent of functional integration indicates the potential viability of a voting unit for bargaining purposes - that is, whether a particular unit can muster meaningful bargaining leverage - and the degree to which the bargaining behavior of a separate unit will disrupt the work activities of members of a larger or other separate unit.

(b) Separate Sense of Identity. A realistic opportunity to collectively organize and establish meaningful collective bargaining goals is fostered by a sense of mutual identity amongst the unit members. For this reason, a separate bargaining unit is preferred where a group has a separate and distinctive sense of identity. The Board seeks to ascertain the mutuality or separateness of employee identity in making its voting unit determinations by examining a number of factors. Included is the nature of the differences or similarities in job skills and functions.[87] The lack of permanent interchange or temporary job transfers are additional factors frequently used by the Board in weighing the quality of mutual identity.[88] Differences in benefits policies amongst professional, departmental or plant groups suggest that there will be an accompanying lack of mutual identity.[89] Dissimilarities in employee background and training will also

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[87] Cornell University, 183 NLRB No. 4 (1970); Ladish Co., 178 NLRB No. 5 (1969); Arnold Constable Corp., 150 NLRB 788 (1965); Standard Oil Co., 107 NLRB 1524 (1954).

[88] Empire State Sugar Co., 166 NLRB 31 (1967) aff'd, 401 F.2d 559 (2d Cir. 1968); Douglas Aircraft Co., 157 NLRB 791 (1966); Georgia-Pacific Corporation, 156 NLRB 946 (1966).

[89] Parke Davis & Co., 173 NLRB No. 53 (1968); Empire State Sugar Co., supra.

reduce the likelihood of a mutual sense of identity.[90] The same is true with respect to differences in employee licensing requirements.[91] Differences in job progression criteria and patterns provide yet another indicator that there may be an absence of a sense of mutuality of identity.[92] And, still another indicator used by the Board is the extent to which work schedules vary between the two groups of employees in question.[93]

(c) Physical Proximity of Work Situs. Physical separation of the work situs, too, contributes to the Board's evaluation that a separate professional, departmental, or plant type unit is preferable.[94] Physical separation is a relevant criterion for much the same reason as is lack of a sense of mutuality of identity. In addition, lack of physical proximity poses serious problems to the organizational opportunities for different groups of employees. The specification of the "plant unit" as one of the enumerated unit categories in section 9(b) of the Act demonstrates that Congress viewed the characteristic of the physical separateness of the work situs as particularly significant.

(d) Degree of Unit Autonomy. Decision making autonomy increases the likelihood that a unit will have distinctive terms and conditions to collectively negotiate and independent bargaining interests to be served by a bargaining agent. Further, the degree of autonomy will influence the extent to which one group of employees must depend on another group for bargaining effectiveness. It will also influence the prospect that the bargaining conduct of

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[90] Ladish Co., supra note 87; Standard Oil Co., ibid.

[91] Parke Davis & Co., supra note 89.

[92] Georgia-Pacific Corp., supra note 88; Parke Davis & Co., supra note 89; Douglas Aircraft, supra note 88.

[93] Parke-Davis & Co., supra note 89.

[94] Parke-Davis & Co., supra note 89; Douglas Aircraft Co., supra note 88.

one group will or will not have direct consequences for the other; that is, for an autonomous employee group,a separate unit provides the most meaningful opportunity to negotiate effectively on a collective basis. Therefore, the presence of autonomy strongly indicates that a separate unit will be preferred.[95]

A number of factors which the Board traditionally examines, in determining whether a separate professional, departmental or plant unit will be preferred, provide insight into the extent to which the unit is autonomous. These factors include whether there is independent control over recruitment and hiring in the unit;[96] whether the group is separately supervised;[97] and whether the group has a different work schedule.[98] Bargaining history provides still another item in the Board's evaluation.[99] And, factors such as job progression patterns and comparitive compensation benefits are relevant to evaluating the extent of autonomy as well as in weighing the mutuality of identity.

3. Application of the Criteria. -

It should be apparent from the portrayal contained in Part IV of this brief that those who teach in an accredited school of law

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[95] Metropolitan Life Ins. Co., 156 NLRB 1408 (1966).

[96] Ladish Co., supra note 87; Douglas Aircraft Co., supra note 88.

[97] Georgia-Pacific Corp., supra note 88; Parke Davis & Co., supra note 89.

[98] Parke Davis & Co., supra note 89.

[99] Georgia-Pacific Corp., supra note 88.

are members of a distinctive professional group - professors of law. Certainly there can be no question but that the law school faculty satisfies the criteria of constituting a group "having common characteristics". From the detailed description provided in Part IV, it is equally clear that the law faculty meets the complete array of tests used by the Board to establish that it is a group with significant interests which are different from those of the more numerous group, the university faculty.

(a) Lack of Functional Integration. University faculties can and do function without a faculty of law; law faculties can and do function without a university faculty.[100] Perhaps the acid test in this regard ought to be what the impact of a work stoppage in either unit would have upon the other unit's operations. In the event of a work stoppage in the law school, the remainder of the university could continue to function on a business as usual basis. The same would be true for the law faculty's ability to function in the event of a work stoppage amongst the rest of the university faculty. In fact, due to academic calendar differences, this state of affairs presently exists for short periods of time on an annual basis at a majority of the nation's accredited law schools.[101]

Further, past experience shows that the law faculty is a viable bargaining unit while operating on its own. Though the university can function with the law school closed, a most valuable and visible dimension of the university's social contributions are dependent on the law school's activities. Accordingly, operating from the strength of its own

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[100] See Part IV §§ 1,3,9,10 of this brief.

[101] See Part IV § 3 of this brief.

position, the law faculty has traditionally been able to command superior faculty, library and physical resources.[102]

The Board has previously placed functionally different professionals, such as nurses,[103] distinctive types of engineers[104] and lawyers,[105] outside of a larger unit of professional employees. Consistent with that precedent, the Board should now find that law faculty members, because of their functional distinctiveness, should be placed in a separate voting unit.

(b) Separate Sense of Identity. As previously noted, law teachers identify strongly with each other and are somewhat removed in their relationships with members of other faculties.[106] This sense of separate identity is reinforced by the law faculty's characteristically different

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[102] See Part IV §§ 2,5,10 of this brief.

[103] Westinghouse Air Brake Co., 121 NLRB 636 (1958); Westinghouse Electric Corp., 112 NLRB 590, 591 (1955); Standard Oil Company, 107 NLRB 1524 (1954).

[104] Douglas Aircraft Co., 157 NLRB 791 (1966); Westinghouse Air Brake Co., supra note 103. Compare, The Ryan Aeronautical Co., 132 NLRB 1160 (1961).

[105] Westinghouse Air Brake Co., supra note 103; Lumbermen's Mutual Casualty Co., 75 NLRB 1132 (1948). In Air Line Pilots Ass'n., 97 NLRB 929 (1951), the Board established a voting unit consisting of 3 lawyers, 2 engineers and a statistician. No one petitioned for a separate unit of the lawyers or a separate unit of the engineers, and the Board did not discuss the question of whether lawyers and engineers belong in the same unit.

[106] See footnote 35, and accompanying text.

type of academic background[107] and work experience,[108] its close link with the practicing profession,[109] and the law faculty's separate promotional criteria,[110] and promotional[111] and salary schedules.[112] Further, the separate and unique teaching experience shared by a law faculty adds to this sense of separate identity,[113] as does the distinctiveness of the particular group of students with whom law teachers are in daily contact.[114] Moreover, operating out of separate facilities,[115] utilizing an independent and unique library,[116] and coping with the particular problems of the law school curriculum,[117] all contribute to the law teacher's separate sense of identity. To convert this to the standard industrial relations terminology, we might say that the law teacher has special training for a special trade, exercises a unique set of skills, and applies these skills in a different sort of environment to a different type of raw material, producing a special and unique product. It is no wonder that the law

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[107] See footnotes 17-23, and accompanying text.

[108] See footnotes 15-16 and 28, 28a, and accompanying text.

[109] See pp. 26-27 of this brief. It might be noted, in this connection, that unlike the part-time teachers in C.W. Post Center of Long Island Univ., 198 NLRB No. 109 (1971), the part-time law teacher's chief full-time function is not teaching. Rather it is law practice. (See footnotes 37-40, and accompanying text.) Through their relationship with the law faculty, therefore, part-time law teachers help to draw legal education into even closer communion with the practicing profession.

[110] See footnotes 24 and 25, and accompanying text.

[111] See footnotes 25-28, 36, and accompanying text.

[112] See footnotes 29-34, and accompanying text.

[113] See Part IV §7 of this brief.

[114] See Part IV §8 of this brief.

[115] See Part IV §2 of this brief.

[116] See Part IV § 10 of this brief.

[117] See Part IV §9 of this brief.

faculty has a separate and independent sense of identity.

In its separate sense of identity, the law faculty is at least as distinctive and apart from the rest of the university faculty as were the sales and service engineers separate and apart from the production engineers in Westinghouse Air Brake Company, 121 NLRB 636 (1958), where that group was placed in a separate voting unit by the Board. The law faculty's separate sense of identity is surely much greater than that of the members of the different departmental units allowed in the Arnold Constable case;[118] and it is at least equivalent, in its intensity of distinctiveness, to that of the nurses, lawyers and engineers given separate voting units in a variety of decisions.[119]

The law faculty by their training, function and responsibilities have a separate professional sense of identity emanating from their joint professional status - - they are members of both the teaching profession and the legal profession. Thus, the law professor's attempt to preserve that special professional identity presents the very kind of need to which Congress was responding when it adopted the Taft-Hartley provisions concerning professional employees.[120] To reject the contention of this brief would accomplish the result condemned in Westinghouse Electric Corp. v. NLRB, 236 F.2d 939, 943 (3d Cir. 1956), where the court reasoned that acceptance of the position that all professionals should be in one unit "would result in the negation of many recognized professional groups characterized by their speciality . . . ." Therefore, the Board should recognize the separate unit of law faculty as preferred.

(c) Physical Distinctiveness and Separation of the Work Situs.

Law teachers work in a different library, typically teach in different classrooms, and are housed in an office complex which is separate from that occupied

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[118] 150 NLRB 788 (1965).

[119] See footnotes 103-105, supra.

[120] See footnotes 84 and 85, and accompanying text.

by the rest of the university's teachers. Almost always these facilities are in a separate building, often in a corner of the campus, and fairly frequently they are removed a considerable distance from the central campus.[121]

In the jargon of academe, the term "separate physical plant" is often used in describing a building which houses a separate academic unit. Inasmuch as the law school is almost always a "separate physical plant," the plant unit analogy is particularly appropriate in analyzing the merits of giving preference to the law faculty as a separate voting unit.

(d) Degree of Unit Autonomy. Law faculties traditionally have a very high degree of autonomy.[122] Partly this is due to the functional distinctiveness of the law school, partly it is attributable to historical development, and partly it is a result of the numerous unique attributes of legal education and law teachers.

That law faculties typically have a great deal of operational and planning autonomy can be appreciated by considering that they normally operate out of separate plants,[123] manage their own library,[124] work under separate academic calendars,[125] use their own faculty recruitment and promotional standards,[126]

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[121] See Part IV §2 of this brief.

[122] See Part IV §4 of this brief.

[123] See Part IV §2 of this brief.

[124] See Part IV §10 of this brief.

[125] See Part IV §3 of this brief.

[126] See Footnotes 15-28, and accompanying text.

operate on a special compensation schedule,[127] determine the standards for student admission[128] and for the awarding of degrees,[129] utilize a distinctive pedagogical methodology,[131] structure their own curriculum and courses,[132] deal directly with a special public, to which it may at times pay greater heed than to the university itself,[133] and select their own chief administrative officer.[134]

The law faculty's high degree of autonomy reflects the fact that its interests are different from those of the larger faculty group -- the university-wide faculty. Further, its autonomy demonstrates that the law faculty has a very practical basis for its sense of separate identity and that it is fully capable of operating as a separate, independent and viable bargaining unit without causing any extraordinary disruption or hardship to the functioning of the university.

The manifest autonomy of the typical law faculty far exceeds that found to warrant a separate voting unit in past decisions.[135] Accordingly, the extensive autonomy of the law faculty impels a decision that a separate unit of law faculty should be preferred.

4. Dangers Inherent in Immersing the Law Faculty Within a Larger Faculty Unit.

The foregoing discussion should make it evident that all of the usual considerations in voting unit determination cases compel the result that a separate unit be preferred by the Board for the law faculty. But were the usual

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[127] See footnotes 29-34, and accompanying text.

[128] See, e.g., Approved Association Policy §6-1 in AALS, Proceedings, 1965 Ann. Meeting, Part One, at pp. 159-160.

[129] See, e.g., Approved Association Policy §6-2, supra n. 128 at p. 160.

[131] See Part IV §7 of this brief.

[132] See footnote 10 and Part IV §9 of this brief and accompanying text.

[133] See footnote 14, and accompanying text and the final two paragraphs of Part IV §9 of this brief.

[134] See footnote 12, and accompanying text.

[135] Douglas Aircraft Company, 157 NLRB 791 (1966); Arnold Constable Co., 150 NLRB 788 (1965). See also, Lumbermen's Mutual Casualty Co., 75 NLRB 1132 (1948).

considerations the only ones involved in the present issue, the AALS might not have deemed it necessary to make this amicus appearance. Rather, there are at least two additional concerns respecting the instant issue which elevate the question to one of great urgency for an association dedicated to the purpose of improving the legal profession through legal education.

Professor Donald Wollett is probably the nation's most experienced academic observer of unionizational activities in higher education. In a recent article he pointed out that to attract and retain quality faculty in a professional area such as law, "universities often find it necessary to prescribe lighter work loads and larger salaries than those of other faculty groups . . . ."[136] Reflecting on the impact of a university-wide unit determination, he goes on to state:

> Collective bargaining agents tend to favor policies that treat all employees alike. . . . If collective negotiations result in a reduction in the favorable differentials enjoyed by professional school faculties, the ability of those schools to attract and retain quality faculty and to function at present performance levels will probably be diminished.[137]

The AALS concurs in Professor Wollett's prediction that negotiation on a university-wide unit basis will adversely affect the quality of legal education. There is no good reason for risking that result inasmuch as the intent of Congress in promulgating §9(b) of the Act is more accurately served by preferring a separate unit for law faculty.

Secondly, legal education (as, perhaps, all of higher education) is in a phase of considerable reappraisal and transition. The law faculties,

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136 D. Wollett, The Status and Trends of Collective Negotiations for Faculty in Higher Education, 1971 Wisc. L. Rev. 2, 18.

137 Id. at pp. 18-19.

the bench, and the bar are all actively engaged in this reevaluation.[138] Encompassed in the current review of legal education are such questions as the optimum duration of formal professional education in law; course and curriculum content; teaching methodology; expansion, protraction or revision of clinical programs; the direction, tools and content of scholarly efforts in law; financial resources for legal education; budgetary priorities; and the relationship of law teaching and legal scholarship to other academic disciplines.[139] Presently the locus of decisionmaking on matters of educational and personnel policy in legal education is decentralized and independent of effective control by university administration. There are those (usually persons in university administration) who argue that the law schools should surrender a significant part of that autonomy and become more comprehensively integrated into the university system.[140] Law faculties, on the other hand, as the academic representatives of the legal profession, see many reasons to be cautious against submergence of their special and distinctive role into a larger and more homogeneous group.

A decision by the National Labor Relations Board to immerse the law faculty into the larger faculty unit could well have the effect

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[138] Statement of the AALS to Senate Subcommittee on Education, reported in AALS, Proceedings, 1970 Ann. Meeting, Part One at pp. 49, 50.

[139] Id. at pp. 50-52, 55-72.

[140] See, e.g., various commentaries in Haber & Cohen, The Law School of Tomorrow at pp. 5-80 (1968).

of a fait accompli respecting the role of the law school in a modern university. As we have seen, that decision could be quite detrimental to the quality of legal education. In any event, surely, if change in that relationship is to come, it should result from a decision made by those entrusted with the responsibility for guiding legal education.

A decision to immerse the law school within the larger university-wide faculty unit might well foreclose any further reappraisal of, or adjustment in, the law school's role within the university and its relation to the profession. Rather, such a determination would tend to move that relationship in the specific direction of total submergence within the University faculty. On the other hand, recognizing that the law faculty is a preferred voting unit apart from the larger university faculty would permit continued reappraisal and adjustment in the law school-university relationship.

VI.

CONCLUSION

From the foregoing, it is clear that the Board will most accurately effectuate the intent of Congress, most closely adhere to its prior decisions, and most effectively respond to the needs and interests of higher education and academic training in the legal profession, by determining that a separate unit of law faculty is the preferred voting unit

under the Act.

Respectfully submitted,

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